The Legislative Assembly of
British Columbia

Select Standing Committee On Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills

REPORT ON A MATTER OF PRIVILEGE

May 2002

Douglas Fir Committee Room,
Parliament Buildings,
May 30, 2002

Honourable Speaker:

The Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills begs leave to report on the matter of privilege pertaining to the premature disclosure of a confidential draft report of the Select Standing Committee on Education, which was referred to the Committee by the House on April 2, 2002.

The Committee has discussed the matter at five meetings held between April 17, 2002 and May 30, 2002. At its meeting on May 1, 2002, the Committee received a briefing from E. George MacMinn, QC, Clerk of the Legislative Assembly of British Columbia, on the law of privilege and its

relationship to contempt of the House.

In light of the admission of the Member for Vancouver-Mount Pleasant to the House on March 27, 2002, the Committee asked that the Member should answer the following questions:

1. Was the Member aware of the rules and practice regarding privilege and confidentiality of dr reports?
2. With whom specifically did the Member share the confidential draft report?
3. Why did the Member feel it was necessary to disclose the confidential draft report?

On May 29, 2002, the Member for Vancouver-Mount Pleasant responded in writing to the three questions. Her response is attached as an appendix.

The Committee recommends that the Member for Vancouver-Mount Pleasant make an unqualified apology in a form satisfactory to the Speaker from her place in the House, as soon as is practicable. After such an apology is made, the Committee recommends no further action be taken against the Member for Vancouver-Mount Pleasant.

The Committee further recommends that, in the future, all Members serving on legislative committees be reminded by the Committee Chair or the Clerk to the Committee of the rules pertaining to confidentiality of draft reports and other committee proceedings.

Barry Penner, MLA
Chair

APPENDIX

SUBMISSIONS TO SELECT STANDING COMMITTEE ON PARLIAMENTARY REFORM, ETHICAL CONDUCT, STANDING ORDERS AND PRIVATE BILLS

JENNY KWAN, MEMBER OF THE LEGISLATIVE ASSEMBLY
APRIL 30, 2002

1. Let me begin by stating that I am obviously very concerned that the Committee has elected to proceed against me without following the legal principles of natural justice. I find this particularly egregious given that the Chair's statements on the record on May 7, 2002, created a legitimate expectation on my part that the principles of natural justice would be followed. In any other context, the Government is required by law to accord these most basic rights to persons who are subject to potential penalties, particularly related to public office. Because the Committee declined my counsel's request for an adjournment to dates next week on which he was available, and either did not address or rejected his request to make submissions to the Committee on my behalf and to call witnesses, I have been forced to include legal submissions

on my own behalf as part of my answers to the Committee's questions. I have had assistance from my counsel in preparing the legal aspects of my submissions.

2. In my submission, since the Committee has decided not to proceed in accordance with the principles of natural justice, it would be inherently unjust for it to recommend any type of penalty to me.

3. In the course of my submissions, I will answer the questions of the Committee that were identified in your letter of May 28, 2002, which I understand to be:

   Why did I feel that it was necessary to disclose the contents of the confidential draft report of the Select Standing Committee on Education?

   With whom did I share the confidential draft report of the Select Standing Committee on Education?

   Was I aware of the rules and practice regarding privilege and confidentiality of draft parliamentary committee reports?

   Why did I feel that it was necessary to "disclose" the contents of the draft report?

4. In addressing this question, I would like to make it clear that at no point did I feel that it was necessary to "disclose" the contents of the draft report in the sense of "disclosing to the public." I did not intend to nor did I in fact "disclose" the Report to Mr. Chudnovsky or to the public. I did share the draft report on a strictly confidential basis with a select group of advisors solely in connection with my work as a Member of the Legislative Assembly, and I will explain why below.

5. Prior to January 31, 2002, I was a member of the Select Standing Committee on Education. I was the only non-Liberal party member of the Committee (with 11 Liberal members). The Committee travelled the province, receiving public presentations and submissions. Sometime shortly before January 31, 2002, I received a copy of the Committee's draft report on the "Future of Education in B.C."

6. I resigned from the Education Committee on January 31, after reading the committee's draft report, and announced that I would be submitting my own report.

7. In an article in the Vancouver Sun on February 1, 2002, Jim Beatty reported that I had said that the draft report was the reason for my resignation. However he also wrote: "Kwan, who will write her own report, **refused to release any information regarding the committee's draft report**."

8. Before drafting my report, I put together an advisory group drawn from a variety of education stakeholders. The members of the advisory group included several Opposition caucus staff members, a policy research analyst from the B.C. Teachers Federation, a person who is a parent and retired principal, a person who is a parent and existing teacher, and two students, but did not include Mr. Chudnovsky. At no time did I share the draft report with Mr. Chudnovsky.

9. I shared within the advisory group and on a strictly confidential basis the December draft report of the Education Committee, in order to obtain their advice as to whether my report should stand alone or whether it should be framed within the context of or in response to the majority report. Following brief discussion, I determined I should produce a stand-alone report. The draft committee report was then put aside and given no further consideration.

10. I only shared the draft Report on condition of complete secrecy and confidence with members of the small group of individuals I gathered to assist me in preparing a separate dissenting Report arising from my participation in the Education Committee process. Members of the Committee will know that I did, in fact, subsequently produce such a report but that the Government Members in the House did not even permit me to table it.

11. My actions were in no way similar to those situations where a member of a Committee purposely provides a draft report to a member of the media with the specific intention of seeing it published. Nor is it similar to those cases where a member of a Committee provides a draft report to the government with the specific intention of allowing the government to pre-prepare its response to the Committee's work. In both situations (the only ones for which precedents exist as far as I am aware), the member of the Committee releases a report for motives and purposes entirely unrelated to his or her work as a Member of the Legislative Assembly. Indeed, unlike my situation, the key fact in such situations is that the Committee Member released the Reports with the intention of interfering with the work of the Legislature. In the present case, I allowed other persons to view the report only on condition of confidentiality and for the sole purpose of assisting me in my work as a Member of the Legislature.

12. This type of inadvertent public disclosure arising from the regular confidential work of a Member of the Legislative Assembly was specifically excluded from the categories of "serious" cases for which some penalty might be appropriate, by the British House of Commons Committee of Privileges in its Second Report of 1984-85 (a copy of which is attached). I quote from that Report as follows:

> [T]he House should exercise its penal jurisdiction "(i) as sparingly as possible and (ii) only when satisfied that it was essential to do so in order to provide reasonable protection for the House and its officers from obstruction or threats of obstruction causing or likely to cause substantial interference with the performance of their functions."
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> [page v of the Report -- also cited in *Parliamentary Practice in British Columbia* (3rd edn.) by the Clerk of the House, Mr. MacMinn, Q.C., at p. 51.]
>
> (...)
>
> One probable source of some leaks is inadvertent disclosure by a Member. Some Members naturally discuss the work of their committees with other members, with their own staff or with others who may have relevant advice or experience, without intending publication, but others may not have the appropriate respect for information of this kind that they have been given in confidence, and published leaks result. [p. viii]

The Committee distinguished these inadvertent "leaks" from the intentional type of leaks of primary concern, which it described as follows:

> But it is clear from the evidence and from the nature of many of the leaks, that the majority of them -- especially the more serious disclosures of the contents of draft Reports -- are the deliberate work of members of committees acting for political or personal motives. [p. ix]

The Committee concluded that it would be unjust to punish a person who was the inadvertent source of information that was subsequently published without that person's knowledge or intent:

> [A]s has often been argued, it might be thought unjust to punish the publisher of a leak while the original source goes unpunished **(although this could not be argued where a leak was inadvertently disclosed or obtained in some other way without the involvement of a Member).** [emphasis added] [p. xii]

When it came to identifying the "serious leaks" for which punishment might be appropriate (pp. xii to xiv), the Committee did not include cases of inadvertent disclosure that arise from Members naturally discussing the work of their committees with other members, with their own staff or with others who may have relevant advice or experience, without intending publication. Even for serious leaks, the Committee suggested that the appropriate penalty in many such cases would be removal from the Committee concerned.

13. In my submission, it does not constitute a breach of privilege for Members to discuss on a strictly confidential basis the work of their committees with other Members, with their own staff or with others who may have relevant advice or experience, without intending publication. A subsequent breach of confidentiality or public disclosure by the persons with whom the information was shared by the Member in confidence may constitute a breach of privilege by the persons with whom the information was shared, but this does not mean that the Member him- or herself has breached privilege.

14. I understand that the Clerk of the House provided the Committee with a document titled "Summary of Selected Case Studies re: Contempt/Privilege Findings against Members". Among the summaries provided is included a reference to a U.K. House of Commons case in 1999 (regarding Mr. Ernie Ross, M.P.). It is clear both from the summary and from a review of the full Committee Reports and Hansard of that case that the case did not involve an inadvertent disclosure arising from a Member naturally discussing the work of their committees with other members, with their own staff or with others who may have relevant advice or experience, without intending publication. Rather, it involved an intentional decision by a Committee member to provide the draft report to members of the Government for political purposes entirely unrelated to Mr. Ross' work as a Member of the House, i.e. to give the Government a political advantage through advance knowledge. Consequently, in my submission, the penalty imposed in that case (suspension from the House for several days) would be entirely inappropriate in this case.

15. Further, given that I am one of only two Opposition Members whose duties as Opposition Members require us to review and comment on the large volume of legislation and committee work of the House, it is particularly important that we have the ability to discuss the work of committees with other Members, with our own staff or with others who may have relevant advice or experience, so long as such disclosures are not intended for publication and are provided in confidence. It surely cannot be expected that two Opposition Members will be in any position to fulfil the basic requirements of scrutiny and criticism of the government alone and unassisted. In these circumstances, any action by this Committee that prevents us two Opposition Members from obtaining such assistance would itself seriously interfere with the proper workings of the House.

With whom did I share the draft report?

16. As stated above, I shared the draft report only with the advisory group consisting of several Opposition caucus staff members, a policy research analyst from the B.C. Teachers Federation, a person who is a parent and retired principal, a person who is a parent and existing teacher, and two students. At no time did I share the draft report with Mr. Chudnovsky.

Was I aware of the rules and practice regarding privilege and confidentiality of draft parliamentary committee reports?

17. I was aware that draft committee reports should not be shared with anyone except on a strictly confidential basis. I was aware that draft committee reports should not be shared with the press or with any other person for the purpose of making the report public before it is presented in the Legislative Assembly. I was aware that draft committee reports should not be provided to persons other than Committee members for political purposes unrelated to my work as a Member or for the purposes of giving the other person a political advantage. I did not, in fact, share the draft committee report with anyone except on a strictly confidential basis. I did not share the draft committee report with the press or with any person for the purpose of making the report public before it was presented in the Legislative Assembly. I did not provide the draft committee report to any person for political purposes unrelated to my work as a Member or for the purposes of giving the person a political advantage.

18. I was not aware, and do not today believe, that there is any impropriety or breach of privilege involved in a Member sharing draft committee reports on a strictly confidential basis with her own staff or with others who may have relevant advice or experience, without intending publication, for purposes solely related to her work as a Member of the Legislative Assembly. I am reinforced in this belief by the British House of Commons Committee of Privileges in its Second Report of 1984-85 from which I quoted above. Indeed, I believed and continue to believe that such confidential consultation is an essential requirement of my work as one of only two Opposition Members in the Legislative Assembly.

19. This was the only basis on which I shared the draft report with anyone. I deeply regret that one of the persons with whom the draft report was shared appears not to have honoured the strictly confidential basis on which it was provided to him or her, and I apologized and apologize again for any role that these events may have played in the publication of information about the draft report. I understand that the Clerk of the House provided the Committee with excerpts from the leading text on parliamentary privilege in Canada, *Parliamentary Privilege in Canada* (2nd edn.) by J.P Joseph Maingot, Q.C. At pages 266 to 267 of the text, Professor Maingot discusses the situation "where a Member is the subject of a question of privilege" and concludes as follows:

> An apology by the offending Member will invariably close the matter without the necessity of putting the motion to a vote.

I made a clear apology at the first instance in this matter. With all respect to the Members of this Committee, there was nothing equivocal in my apology. I disclosed to the House exactly what I had done with the draft Report, and apologized for any part I may have played in the matter. Obviously, beyond my direct knowledge of what I had done with the report, I was not in a position to state with any certainty the specific means by which Mr. Chudnovsky came into possession of the information he disclosed to the media.

Yet even in the absence of such knowledge, I offered a complete apology. In my submission, the issues with respect to me should have been brought to an end immediately with my apology.

20. I never intended the draft report to be published in any way, nor did I ever intend for anyone except for the members of my consultation group to be given any knowledge of the contents of the draft report. I make no comment on the question of whether these other people may have breached the privileges of the House by not keeping the Report confidential and/or by making public statements about the content of the Report; this is an entirely separate question from the question of whether I breached the privileges of the House in the course of doing my legitimate work as a Member of the Legislative Assembly.

21. I knew that the draft report was confidential and not for public release, but I never shared the report with anyone on anything other than a confidential basis and at no time did I make a public release of the draft report or intend to enable others to do so. I was and am aware that the Government engages in similar consultations on a strictly confidential basis prior to introducing matters such as Bills and the Budget to the Legislative Assembly. I am also aware that Committees of this Assembly often seek outside input and assistance on a confidential basis.

Conclusion

22. On the basis of all of the above, I respectfully submit that the Committee's Report to the Legislative Assembly should include the following recommendations:

    (a) A finding that I have committed no breach of the privileges of the Legislative Assembly;

(b) Recognition that Members naturally discuss on a strictly confidential basis the work of their committees with other Members, with their own staff or with others who may have relevant advice or experience, without intending publication, and that such activity in itself does not constitute a breach of the privileges of the Legislative Assembly or does not in itself constitute a serious and punishable breach of the privileges of the Legislative Assembly;

(c) If, in the alternative, the Committee votes to disregard the clear line of precedents to which I have referred above and votes to find that I have committed some breach of the privileges of the Legislative Assembly, at the very least it should make a finding that it was inadvertent, it was in the course of performing and solely for the purpose of performing my duties as a Member of the Legislative Assembly, it was not serious and does not warrant further penalty;

(d) Recognition of the sufficiency of my apology to the House;

(e) Recommendation of no further penalty or proceedings against me.

Respectfully submitted, May 30, 2002,

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Jenny Kwan, MLA